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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935.

No. 544

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY,

Appellant,

vs.

THE TAX COMMISSION OF THE STATE OF WASHINGTON, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

STATEMENT AS TO JURISDICTION.

MAURICE MCMICKEN,
H. J. RAMSEY,
OTTO B. RUPP,
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 544

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, A CORPORATION,

Appellant,

vs.

THE TAX COMMISSION OF THE STATE OF WASHINGTON, AND T. S. HEDGES AND T. M. JENNER, AS MEMBERS OF THE TAX COMMISSION OF THE STATE OF WASHINGTON.

STATEMENT AS TO JURISDICTION.

The appellant, in support of the jurisdiction of the Supreme Court of the United States to review the above entitled cause on appeal, respectfully represents:

A.

Statutory Provisions Sustaining Jurisdiction.

The statutory provision believed to sustain the jurisdiction of the Supreme Court of the United States is

Judicial Code, § 237 (a) (28 U. S. Code § 344), reading, to the extent relevant here, as follows:

> "Section 237. (a) A final judgment or decree in any suit in the highest court of a state in which a decision could be had * * * where is drawn in question the validity of a statute of any state, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error * * *"

The remedy by writ of error under the foregoing section has been abolished and an appeal substituted.

Act of January 31, 1928, as amended by the Act of April 26, 1928; 45 Stat. 54; 45 Stat. 466 (28 U. S. Code, §§ 861 a, 861 b);

Nashville, etc. Ry. v. *White,* 278 U. S. 456, 460;

Great Northern Ry. Co. v. *Minnesota,* 278 U. S. 503, 506;

Larson v. *South Dakota,* 278 U. S. 429, 432.

B.

Statute of the State the Validity of Which is Involved.

The statute of the State of Washington, the validity of which has been sustained by the Supreme Court of the State of Washington, the highest court of said state, as not being violative of or repugnant to the provisions of the Constitution and Laws of the United States, is Chapter 191, Session Laws of 1933, State of Washington. The pertinent provisions thereof are:

"Chapter 191

(S. H. B. 92).

Occupation Tax..

An Act relating to taxation; imposing taxes upon the privilege of engaging in business activities and providing for the ascertainment, assessment, collection and distribution thereof; providing for the administration and enforcement of this act; providing penalties, making appropriations; and declaring that this act shall take effect immediately.

Be it enacted by the Legislature of the State of Washington:

Section 1. For the purposes of this act unless otherwise required by the context:

* * * * * * *

(6) The term 'gross income' means the value proceeding or accruing from the sale of tangible property, real or personal, or service or both and all receipts, actually received by reason of the investment of the capital of the business engaged in, including interest, discount, rentals, royalties, fees or other emoluments however designated and without any deduction on account of the cost of property sold, the cost of materials used, labor costs, interest or discount paid or any other expenses whatsoever and without any deduction on account of losses; *Provided,* The term 'gross income' shall not include any payments received on accounts or notes outstanding at the time this act goes into effect.

* * * * * * *

Sec. 2. (2) From and after the first day of August, 1933, and until the thirty-first day of July, 1935, there is hereby levied and there shall be collected from every person an annual tax or excise for the privilege of engaging in busi-

ness activities. Such tax or excise shall be measured by the application of rates against values, gross proceeds of sales, or gross income, as the case may be, as follows:

* * * * * * *

(e) Upon every person engaging or continuing within this state in the following businesses; as to such persons the amount of tax or excise shall be equal to the gross income of the business multiplied by the rate set out after the business as follows:

* * * * * * *

VI. Telephone and telegraph companies: three per cent.

* * * * * * *

Sec. 3. If any person shall engage or continue in any business or the performance of any function for which a privilege tax is imposed by this act, he shall be deemed to have applied for and to have duly obtained from the State of Washington a license under this act to engage in and to conduct such business or perform such function for the current tax year, upon the condition that he shall pay the tax accruing to the State of Washington under the provisions of this act; and he shall hereby be duly licensed to engage in and conduct such business or perform such a function.

* * * * * * *

Sec. 6. The taxes imposed hereunder shall be due and payable in monthly installments on or before the fifteenth day of the month next succeeding the month in which the tax accrued. The taxpayer, on or before said fifteenth day of the month, shall make out a return, upon such forms and setting forth such information as the tax commission may require, showing his estimate of the amount of the tax for which he is liable for the preceding month, sign and transmit the same to the tax commission, together with a remittance for said amount in the form required by section 20 of this act. Whenever the total tax for which any per-

son is liable under this act does not exceed the sum of ten dollars ($10.00) for any month, a quarter-yearly return and remittance in lieu of the monthly return may be made on or before the fifteenth day of the month next succeeding the end of the quarter-year for which the tax is due. Whenever the total tax for which any person is liable under this act does not exceed the sum of ten dollars ($10.00) for any quarter-year an annual return and remittance in lieu of the quarterly return may be made as provided in section 7 of this act. The tax commission, for good cause shown, may extend the time for making and filing any monthly or quarterly return as required under this section, and may grant such reasonable additional time within which to make and file such return as it may deem proper; but the time for making and filing such return shall not be extended beyond the fifteenth day of the month next succeeding the regular date of the return.

C.

Date of Judgment and Date of Application for Appeal.

The date of the final judgment of the Supreme Court of the State of Washington sought to be reviewed is August 31, 1935.

The judgment of the Supreme Court of the State of Washington, which was a judgment reversing the decision of the trial court holding the aforesaid Chapter 191 unconstitutional, and directing the dismissal of the suit brought by the appellant, is a final judgment within the meaning of Judicial Code, § 237.

Missouri & Kansas Interurban Ry. Co. v. *Olathe,* 222 U. S. 185.

The time for taking the appeal began to run on the date of such final judgment, to-wit, August 31, 1935. (See *Puget Sound Power & Light Co.* v. *King County,* 264 U. S. 22, where the time for appealing from the judgments of the

Supreme Court of the State of Washington is considered.)

The date on which the application for appeal was presented and the appeal allowed is August 31, 1935.

D.

The Nature of the Case and the Rulings Below.

The nature of the case and the rulings below which are deemed to bring the case within the jurisdictional provision relied on are as follows:

The appellant, The Pacific Telephone and Telegraph Company, commenced this suit in the Superior Court of the State of Washington for Thurston County to enjoin the appellees from collecting of the appellant the tax upon gross income prescribed by Chapter 191 of the Session Laws of Washington of 1933, and to restrain any attempt by the said appellees to enforce said statute and its penalties against the appellant.

The appellant filed its amended complaint in the above entitled cause, alleging the following material facts:

That appellant is a corporation duly organized under the laws of the State of California and duly licensed to do business in the State of Washington. (Paragraph I.)

That T. S. Hedges and T. M. Jenner were the members of the Tax Commission of the State of Washington, a continuing board composed of three members, of which only the two above named had been appointed and qualified at the time of the filing of the amended complaint. (Paragraph II.)

That appellant owns and operates a public telephone and telegraph system in the State of Washington and in the States of California, Oregon and a portion of Idaho, furnishing to the public therein telephone exchange service and

both intrastate and interstate telephone and toll service and telegraph service; that it had, prior to 1933, filed with the Postmaster General of the United States its written acceptance of the restrictions and obligations required by the Post Roads Act (14 Stat. 221), and is subject to the Acts of Congress regulating interstate commerce. (Paragraph III.)

That Chapter 191 of the Laws of Washington of 1933 (p. 871) provides in Section 2 (2) that "from and after the first day of August, 1933, and until the thirty-first day of July, 1935, there is hereby levied and there shall be collected from every person (and corporation) an annual tax or excise for the privilege of engaging in business activities" in the State of Washington, measured by a percentage of gross income of certain business activities described in said Section 2, and by said Section 2 (2) (e) (VI.) (p. 873) a tax of three per cent of said gross income is imposed on telephone and telegraph companies, including the appellant in this court, for the privilege of engaging in such business activities in the State of Washington. By Section 5 of Chapter 191 of the Laws of Washington of 1933 (p. 879) there is excepted from taxable gross income so much as is received from the United States, the State of Washington, "or from business which the State of Washington is prohibited from taxing under the Constitution of this State or the Constitution or laws of the United States." That in the trial court the appellees construed said act as not applying to the gross income from interstate business, but contended that the same applies to the gross income from appellant's intrastate business, and that appellant owes and must pay said three per cent of gross income for the privilege of doing intrastate business in the State of Washington. (Paragraph V.)

That appellant constructed and equipped its telephone and telegraph business in the State of Washington many

years prior to the enactment of said Chapter 191, and has expended therefor more than $60,000,000 to provide adequate facilities for both interstate and intrastate telephone and telegraph service. (Paragraph VIII.)

That appellant is subject to Chapter 117 of the Laws of 1911 of the State of Washington, known as the "Public Service Commission Law," and thereby and by the Constitution of the State of Washington, Article XII, Sections 13, 14, 15 and 19, there is imposed upon appellant an obligation to devote its properties to the service of the people in the State of Washington in the furnishing of telephone and telegraph service, from which appellant cannot withdraw while continuing to carry on its interstate business. (Paragraph IX.)

That the tax of three per cent on the gross income, imposed by said Chapter 191 of the Laws of 1933, is not a property tax nor in lieu of a property tax, but is an excise tax imposed solely for the privilege of doing intrastate business, and appellant cannot escape said tax by abandoning its intrastate business while continuing in its interstate business. (Paragraph X.)

That appellant has paid all taxes of any and every kind levied either by the State of Washington or any subdivision of said State against all of its property and due at the time of the filing of the amended complaint, the real property taxes amounting to $115,681.34, and one-half of the personal property taxes amounting to $582,309.17; that the remaining one-half of the personal property taxes could be paid without penalty on or before November 30, 1933. (Paragraph XI.)

That appellant's interstate and intrastate business is inseparable, commingled and mutually dependent; that both classes of business are done by appellant over the same telephone and telegraph lines, through the same exchanges,

operated by the same employes and with the same facilities, and that it is not possible, practically or economically, or at all, to conduct separately intrastate and interstate business by different lines, through different exchanges or by means of different instrumentalities or employes; that appellant's gross operating revenue in the State of Washington for the year 1932 from the conduct of its entire business, both intrastate and interstate, was a large sum of money, aggregating $11,295,788.86, and of said sum a very large portion was derived from interstate telephone and telegraph business originating in or coming to the State of Washington. (Paragraph XII.)

That if appellant could and should abandon its intrastate telephone and telegraph business, the entire burden of maintaining its intrastate system of telephone and telegraph service, equipped to handle both classes of business, would fall entirely on interstate business and would necessitate an increase of rates greater than the same could bear as a practical matter or at all, and would result in the destruction of an essential instrument of interstate commerce and of the value of appellant's property in an amount of many millions of dollars. That the tax imposed by said Chapter 191, Laws of Washington of 1933, on the pretext of a tax or fee for the privilege of doing intrastate business in the State of Washington, is in reality a tax or burden upon interstate commerce and upon the gross revenues received by appellant therefrom and is a tax upon appellant's business done and upon income earned in other states and upon property located outside the State of Washington, and is in violation of the commerce clause of the Constitution of the United States, being Article I, Section 8, thereof, and of the due process clause of the Fourteenth Amendment to the Constitution of the United States, and of the Acts of Congress regulating interstate commerce. (Paragraph XIII.)

That by various sections of Chapter 191 penalties are provided for failure on the part of the taxpayer to make monthly and annual returns, or for the making of incorrect returns, and for the non-payment of said tax of three per cent on gross income; that no provision is made by said sections, or otherwise in the act, for refund of taxes paid, if said Chapter 191 should be held unconstitutional as to appellant; that appellant has refused to make any return and refuses to pay any tax; that the appellees threaten to and will, unless restrained, invoke the penal provisions of said Chapter 191, and also will, unless restrained, issue a warrant directed to the sheriff, commanding him to sell the real and personal property of the appellant within any county in the State of Washington, thus clouding the title to appellant's property and depriving appellant of its use, and, in addition, appellant will be prosecuted as for a gross misdemeanor; that appellant has no adequate remedy at law for said wrongs and injuries, because, if it makes the monthly payment provided for by the act, it will be necessary to bring repeated actions at law to recover said payments, and there is no provision made in the act for the satisfaction of any judgment which appellant might obtain. (Paragraphs XIV, XV, XVI and XVII.)

A temporary injunction, in conformity with the prayer of the amended complaint of appellant, was issued by the Superior Court of the State of Washington for Thurston County, and on appeal to the Supreme Court of the State of Washington said court affirmed the action of said Superior Court in granting a temporary injunction pending the hearing of the case. (42 P. (2d) 420.)

The appellees answered on July 20, 1934, and trial was had before said Superior Court for Thurston County on January 9, 1935. On March 11, 1935, the Honorable D. F. Wright, one of the judges of said Superior Court, signed a decree declaring that the tax imposed upon appellant by

said Chapter 191 of the Session Laws of Washington of 1933, was in violation of Article I, Section 8, of the Constitution of the United States, and of the Fourteenth Amendment to the Constitution of the United States, and said decree permanently enjoined the appellees from enforcing against appellant any of the provisions of said Chapter 191 of the Session Laws of Washington of 1933.

Thereafter an appeal was prosecuted by said appellees from said decree to the Supreme Court of the State of Washington, and upon the said appeal the decree of the Superior Court for Thurston County was reversed, in an opinion filed on August 13, 1935, on the ground that said Chapter 191 of the Session Laws of Washington of 1933 did not violate Article I, Section 8, of the Constitution of the United States or the Fourteenth Amendment to the Constitution of the United States, and that said act was in all respects valid as to this appellant.

Thereafter, on the 28th day of August, 1935, the Supreme Court of the State of Washington filed a per curiam opinion, directing that the suit brought by this appellant, as aforesaid, in the Superior Court of the State of Washington for Thurston County, be dismissed; and on the 31st day of August, 1935, final judgment of the said Supreme Court of the State of Washington, directing dismissal of said action, was entered.

E.

Cases believed to sustain the jurisdiction of this Court.

The following cases are believed to sustain the jurisdiction of this Court:

King Manufacturing Co. v. *City Council of Augusta*, 277 U. S. 100;

Sprout v. *South Bend*, 277 U. S. 163, 171;

Cooney v. *Mountain States Tel. & Tel. Co.*, 55 Sup. Ct. 477, 481, 482;

Mountain States Tel. & Tel. Co. v. *Cooney*, 7 F. Supp. 12 (three-judge court); Affirmed 55 Sup. Ct. 477;
Pullman Co. v. *Adams*, 189 U. S. 420;
Bowman v. *Continental Oil Co.*, 256 U. S. 642, 648;
Interstate Busses v. *Holyoke Street Ry.*, 273 U. S. 45, 51.

We respectfully submit that the Supreme Court of the United States has jurisdiction of this appeal by virtue of Section 237 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (U. S. C., Title 28, Section 344).

Respectfully submitted,

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(7045-C)